Nos.

221

224

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

Nos. 221 and 224.

JOSEPH COSTELLO,
Petitioner,

v.

UNITED STATES OF AMERICA.

JOSEPH JOHN CANNELLA,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Of Order Denying Petition for Writ of Certiorari.

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UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Of Order Denying Petition for Writ of Certiorari.

Petitioners pray that this Court grant rehearing of its order of October 13, 1958, denying the petitions for writ of certiorari, and that a writ of certiorari issue to review the judgments of the Court of Appeals for the Eighth Circuit in the above-entitled causes as prayed for in the petitions filed July 25, 1958, and July 26, 1958.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT.

These causes present the issue whether evidence obtained solely by state officers in an illegal search may be admissible in federal court, despite the Fourth Amendment.

This question was presented to the Eighth Circuit and it held, relying on its decision in **Jones v. United States**, 8 Cir., 217 F. 2d 318, that evidence which was seized by state officers was admissible because no federal officers participated in the search. At the time of the filing of the petition there was no conflict of decisions with another Court of Appeals. But on October 2, 1958, the United States Court of Appeals for the District of Columbia in the case of **Hanna v. United States**, 27 L. W. 2158 (Appendix, infra, p. 6), held that evidence obtained solely by state police officers during an illegal search cannot be used in a federal criminal proceeding.

The facts on this issue in the instant case summarized in the instant case by the Eighth Circuit as follows (Costello Pet. App. 24):

> "Costello was arrested by St. Louis police officers and taken to the city jail where he was searched and questioned and discharged. The Cadillac car which he was driving when arrested was also searched. He denied having a key to the glove compartment of the car, but the police officers found one in the keys taken from him fitted the glove compartment lock. The officers opened the compartment with the key and took possession of a revolver contained in it, which was shown to be the revolver described in the indictment as having been received by him. The arrest, search and seizure were found to have been illegal under Missouri law in a proceeding in the Missouri State Court and it is not contended for the Government that they were legal under the federal law. But it was not shown that any federal officer took part in the search and the court's refusal to suppress the gun and receiving it in evidence were sanctioned by the decision of this Court in **Jones v. United States**, 8 Cir., 217 F. 2d 381, 382-383. Cf. **United States v. Benanti**, 2nd Cir., 244 F. 2d

389, 392. The Court's refusal to suppress the guns was without error."

In the **Hanna** case, the defendant was convicted of housebreaking and larceny in the District of Columbia and appealed the refusal of the District Court to suppress as evidence a quantity of money seized by Maryland police officers without a warrant from a motel room occupied by the defendant. This money was not the major part of the evidence admitted against Hanna. The Court of Appeals found that the search was not a proper incident of a lawful arrest under Maryland law for the reason there was no probable cause for believing that the person arrested had committed a felony. The Court then considered the question: "May articles obtained by an unreasonable search and seizure by state officers, without any involvement of federal officers, be introduced in evidence in a court of the District of Columbia, or in any federal court?" The Appellate Court for the District of Columbia found that the decision in **Wolf v. Colorado**, 338 U. S. 25, overruled the very constitutional pronouncement which is the basis of **Weeks v. United States**, 232 U. S. 382, which said that a search and seizure by State officers was not a violation of any rights secured by the Constitution. The Appellate Court said:

> "* * * So, the precise decision in the **Wolf** case was that a state need not exclude evidence obtained by unconstitutional means from its judicial proceedings. But, in ruling that the Fourth Amendment prohibition operates through the Fourteenth to make unreasonable state searches unconstitutional, the Court in **Wolf** overruled the very constitutional pronouncement and holding upon which the **Weeks** decision, and our **Shelton** decision following Weeks, had predicated the admissibility of state seized evidence in a federal trial."

The **Hanna** opinion finds additional reasons for its decision in statements of this Court in **Lustig v. United States**, 338 U. S. 74, and **Irving v. California**, 374 U. S. 128. That Court also found expressions of opinion by a majority of the Justices of this Court to be in accord with the rule that all evidence obtained by an unconstitutional search and seizure is unacceptable in federal courts. It further concluded that as a matter of judicial integrity such evidence should not be admitted in a federal trial, and the refusal of the federal Courts to permit the use of such improperly obtained evidence will have an effect of persuading state as well as federal officers to follow constitutional methods and procedures in obtaining evidence.

On the other hand the Eighth Circuit in **Jones v. United States**, 8 Cir., 217 F. 2d 318, which was the case relied upon to affirm the instant judgment on this question also considered the decisions of this Court in **Weeks, Wolf, Lustig** and **Irvine**. But the Eighth Circuit, in conflict with the **Hanna** decision, stated in the **Jones** case that it would adhere to the rule that the Federal Government could avail itself of evidence improperly seized by state officers operating entirely upon their own accounts unless and until this Court expressly repudiated or explicitly changed this rule.

This Court's concern with the uniform administration of criminal justice in the various circuits warrants a resolution of this conflict.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of

certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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.....

.....

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APPENDIX.

Conflicting Opinion.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 14,462

Samuel J. Hanna, Appellant

v.

United States of America, Appellee

Appeal from the United States District Court
for the District of Columbia

Decided October 2, 1958

Mr. Frederick A. Ballard (appointed by this court), with whom Mr. Eugene B. Thomas, Jr., was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, and Carl W. Belcher and Thomas A. Flannery, Assistant United States Attorneys, were on the brief, for appellee.

Before Bazelon, Circuit Judge, Hastie, Circuit Judge, United States Court of Appeals for the Third Circuit,* and Danaher, Circuit Judge.

Hastie, Circuit Judge: Convicted of housebreaking and larceny in this District, the appellant Hanna grounds this

* Sitting by designation pursuant to the provision of Sec. 291 (a), Title 28, U. S. Code.

appeal on the refusal of the District Court to suppress certain evidence; to wit, a quantity of money seized by Maryland police officers in a predawn search of a motel room occupied by appellant. Part of the hoard, paper money, was found under the sheets of the bed occupied by Hanna. The rest of the money, in coins, was found in a bag under his bed.

The search was admittedly without warrant. We need not examine most areas of the large body of authoritative rulings limiting very strictly the circumstances in which a search of premises without a warrant may constitutionally be made. For the only justification the prosecution urges for the search in this case is that it was a proper incident of a lawful arrest.

These are the circumstances of the arrest and search. Shortly after 4 a. m. state police officers came to a Maryland motel in response to a call from the motel keeper. When they arrived they were told that about 4 a. m. a man had rented two communicating rooms or cabins, ostensibly for himself and his invalid wife; that the motel keeper had not seen the woman but had seen two men entering the cabin with an overnight bag and what looked like a money bag. The motel keeper also related that he had looked through a window into one room and had observed the men sitting on the bed counting money. Thus informed, the police approached the rooms in question and found them dark and quiet. They knocked at the outer door which was opened from within by the occupant whom they confronted with a shot gun. As they entered they recognized the occupant as Robert Judd, a person with past convictions of theft who was then at large in Maryland on bond and was being sought by his bondsman because of delinquency in payment of the bond premium. Immediately upon thus recognizing Judd, the police placed him under arrest and proceeded to search the room he

was occupying and the adjoining room in which appellant had retired. Actually, the officers pulled the cover from appellant, required him to get out of bed and thereafter found the money in and under the bed.

In this record, the interrogation of Sergeant Bond, the arresting officer and apparently the officer in charge of the police detail, reveals great uncertainty on his part as to the reason and basis for arresting Judd. Sergeant Bond was asked whether he intended to make an arrest when he knocked on the cabin door. He replied, "I did not know what I thought because I did not know what to expect." In any event, the door was opened by a man whom the sergeant recognized as one who had been convicted of theft and was even then at large on bail. At that point and without more, the officer says he decided to make the arrest, and did so. In these circumstances, it is not surprising that the sergeant was vague and vacillating as to the reason for this arrest. At one point he stated that he arrested Judd for investigation in the light of the report he had received from the motel keeper. At another point he varied this by saying: "I arrested him for having in his possession narcotics and money and held him for investigation." Of course, this could not have been true because the contraband was discovered after and not before the arrest. Again, the officer testified that he was influenced by recognizing Judd as a person on bail whose bondsman had complained of non-payment of the bond premium. In this connection the sergeant made the puzzling statement, "I placed him under arrest because the fellow had been placed under arrest in our jurisdiction."

Maryland recognizes and enforces the familiar rule that, where no crime has been committed in his presence, a peace officer may make an arrest without warrant only on a felony charge, and then only on probable cause in the sense of reasonable ground for believing that the person

arrested has committed the felony charged. **Edwards v. State**, 1950, 196 Md. 233, 76 A. 2d 132; **Freedman v. State**, 1950, 195 Md. 275, 73 A. 2d 476. Sergeant Bond's own testimony cannot reasonably be said to disclose probable cause for arresting Judd on a felony charge. An arguable case might have been made in support of the arrest had the police been advised of a recent theft and alerted to be on the lookout for the suspected perpetrator. At least they would then have had some affirmative indication that the motel keeper's report might be related to a recent crime. **Cf. Edward v. State**, supra. But not until many hours later did the Maryland police learn of the earlier burglary in the District of Columbia, the proceeds of which constituted the evidence here sought to be suppressed. When the arrest was made the police had nothing significant upon which to go except Judd's known criminal record and the report that he had taken a money bag into the motel on registering very late at night. These circumstances aroused suspicion, and properly so. They may well have justified questioning and surveillance, but they certainly fell short of providing probable cause for a felony arrest at that point. We think it rather clear from what the officers knew and from Sergeant Bond's testimony that a decision was made to arrest on suspicion first, and then to see what could be found which would establish probable cause for detention on a felony charge.

In these circumstances the arrest could not provide any justification for the search which followed.[1] The entire

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[1] While our conclusion that the arrest was illegal is decisive, it seems appropriate to note in addition that, even if we should assume that the detention of Judd was justified, there would remain a serious question whether the circumstances of this arrest justified the ensuing exploratory search which carried the officers through a door, into an adjoining bedroom and into and under the bed in which another person had retired. *Cf. United States v. Lefkowitz*, 1932, 285 U. S. 452; *Go-Bart Importing Co. v. United States*, 1931, 282 U. S. 344; *Johnson v. State*, 1949, 193 Md. 136, 66 A. 2d 504.

nighttime search without warrant, including the excursion into the bedroom which yielded the money in controversy, must therefore be viewed as unreasonable and illegal. It violated Maryland law and, as will appear later, an unreasonable search by state officers also violates the Fourth Amendment as incorporated into the Fourteenth.

This brings us to a serious and important issue of law. May articles obtained by an unreasonable search and seizure by state officers, without any involvement of federal officers, be introduced in evidence in a court of the District of Columbia, or in any federal court?

We find it useful to trace the history of this question in the Supreme Court and, to some extent, in the Courts of Appeals. More than forty years ago, in **Weeks v. United States**, 1914, 232 U. S. 383, the Supreme Court reviewed a federal conviction said to have been based upon evidence obtained in two unauthorized and unreasonable searches and seizures, one by federal officers and the other by state officers. The Court held that the refusal of the trial court on appropriate motion to return the articles seized in the search by federal officers was a denial of a right secured by the Fourth Amendment and, therefore, that the subsequent admission of those articles in evidence was reversible error. However, the Court ruled that the equivalent search and seizure by state officers was not a violation of any right secured by the Constitution.[2] Accordingly, no error was found in the introduction of articles thus seized in evidence.

More than thirty years later, but with the **Weeks** doctrine still unquestioned law,[3] this court decided, properly

[2] A month earlier the Court had made an almost casual ruling to the same effect in different context. *National Safe Deposit Co. v. Stead*, 1914, 232 U. S. 58, 71.

[3] *Cf. Feldman v. United States*, 1944, 322 U. S. 487; *Byars v. United States*, 1927, 273 U. S. 28.

citing and relying upon **Weeks**, that articles seized by New York police officers in the course of an unreasonable search were admissible in evidence in a trial in the District of Columbia. **Shelton v. United States**, 1948, 83 U. S. App. D. C. 257, 169 F. 2d 665, cert. denied, 335 U. S. 834.

Then came **Wolf v. Colorado**, 1949, 338 U. S. 25. There the Supreme Court ruled explicitly, for the first time and contrary to the **Weeks** ruling on the point, that an unreasonable search and seizure by a state officer violates the Constitution because the Fourth Amendment prohibition of unreasonable searches and seizures is to be read into the Fourteenth Amendment as a requirement of due process of law. In the Court's words: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clauses." 338 U. S. at 27-28. The Court next reasoned that in enforcing this constitutional prohibition the states are not required to forbid the use of wrongfully seized items in evidence, though the use of evidence obtained by violation of the Fourth Amendment is forbidden in the federal courts under the **Weeks** rule. The states may content themselves with other sanctions against unreasonable searches and seizures. So, the precise decision in the **Wolf** case was that a state need not exclude evidence obtained by unconstitutional means from its judicial proceedings. But, in ruling that the Fourth Amendment prohibition operates through the Fourteenth to make unreasonable state searches unconstitutional, the Court in **Wolf** overruled the very constitutional pronouncement and holding upon which the **Weeks** decision, and our **Shelton** decision following **Weeks**, had predicated the admissibility of state seized evidence in a federal trial.

Oddly, even since the **Wolf** decision several Courts of Appeals have followed **Weeks** as to the admissibility of

evidence obtained by state officers in federal trials on the no longer tenable theory that the Constitution does not prohibit unreasonable searches and seizures by state officers. **E. g., Serio v. United States**, 5th Cir. 1953, 203 F. 2d 57 , 578, cert. denied, 346 U. S. 887; **United States v. Moses**, 7th Cir. 1956, 234 F. 2d 124, 125; **Gallegos v. United States**, 10th Cir. 1956, 237 F. 2d 694, 696. Overlooking the fact that since the **Wolf** case an unreasonable state seizure must be recognized as a violation of the Constitution, these courts have failed to come to grips with the problem whether there should be in the federal courts a comprehensive rule that evidence obtained by invasion of a constitutional right, whether by a state or federal officer, is inadmissible. **Cf. Jones v. United States**, 8th Cir. 1954, 217 F. 2d 381.

On the other hand, since the **Wolf** case Justices of the Supreme Court have repeatedly recognized that it is no longer possible to accept the **Weeks** [illegible] as settling this problem of federal use of evidence secured by unreasonable state search. Most recently, Mr. Chief Justice Warren has noted, ignoring the old **Weeks** ruling on the question, that "it has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment." **Benanti v. United States**, 1957, 355 U. S. 96, 102 n. 10. Mr. Justice Frankfurter too has recognized the question as open, saying that "where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers." **Lustig v. United States**, 1949, 338 U. S. 74, 79.

Even more striking are expressions of opinion by three other Justices. Mr. Justice Douglas, dissenting from the ultimate holding in **Wolf v. Colorado**, supra, tersely stated his conclusion that state and federal courts should be re-

quired to exclude evidence obtained by either state or federal officers through an unreasonable search. 338 U. S. at 40. On a subsequent occasion he reaffirmed his conviction that "we should be alert to see that no **unconstitutional** evidence is used to convict any person in America." See **Irvine v. California**, 1954, 347 U. S. 128, 149, 152.[4]

Mr. Justice Clark has gone just as far. Only stare decisis has persuaded him to support the ultimate **Wolf** conclusion that a state court may use unconstitutionally obtained evidence. See Clark, J., concurring in **Irvine v. California**, supra, at 138. In the federal courts he would apply the basic generalization of the **Weeks** case, "that evidence obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions." See **Breithaupt v. Abram**, 1957, 352 U. S. 432, 434. And in the light of his dissatisfaction with the ultimate **Wolf** holding it is impossible to believe that he would restrict this considered generalization to cases where the violation of the Constitution has been by federal officers.

Finally, Mr. Justice Harlan has put his view of the impact of **Wolf** on **Weeks** quite succinctly:

> ". . . the only difference I can see between the **Wolf** decision and **Weeks v. United States**, . . . excluding in federal criminal trials evidence obtained in contravention of the Fourth Amendment, is the difference between state and federal courts; in each case, the substance of the constitutional command is the same, but the nature of enforcement varies with the forum." See

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[4] Mr. Justice Douglas also joined in a concurring opinion in *Lustig v. United States, supra*, preferring to base that decision on the broad proposition that "the important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us." 338 U. S. at 80.

dissenting opinion in **Rea v. United States**, 1956, 350 U. S. 214, 218, 220.

The "constitutional command", if we understand Justice Harlan correctly, enjoins federal and state officers alike from unreasonable searches and seizures. Thus, the Justice seems to be saying that the **Weeks** case requires one type of enforcement of this comprehensive command in federal courts, while the **Wolf** case permits less drastic enforcement in state courts.

On the other hand, one Justice seems to have committed himself since and despite the **Wolf** case to a continuing recognition in federal trials of the original **Weeks** distinction between federal and state seizures. We think this is the necessary meaning of Mr. Justice Burton's concurrence in the dissent in **Lustig v. United States**, supra, 338 U. S. at 80, although we are not unmindful that he joined later in Mr. Justice Harlan's dissent in the **Rea** case, discussed above. In any event, no other Justice now in active commission seems to have approved the **Weeks** distinction since the **Wolf** decision.

In cumulative effect these several pronouncements by so many Justices of the present Court support the rational argument that the **Weeks** and the **Wolf** decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts. At very least it seems clear that this is a position toward which several Justices are strongly inclined, with one Justice apparently in disagreement and others indicating no more than that they regard the question as open. Certainly, neither the **Weeks** holding as to state-seized evidence nor our own **Shelton** decision can properly be regarded as binding precedents in the light of the subsequent **Wolf** ruling and the cited indications of the present views of so many justices.

On principle and as a matter of sound policy in the administration of judicial proceedings in the District of Columbia we think all evidence obtained by violation of the Constitution should be excluded. In this area, as Mr. Justice Jackson has reminded us, decision "whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, 'for admissibility of evidence is governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' Fed. Rules Crim. Proc., 26." See **Irvine v. California**, 1954, 347 U. S. 128, 134-135. What then should be the controlling considerations when unconstitutionally obtained evidence is offered in a court of the United States? One influential consideration is that which moved Justice Holmes and Justice Brandeis in their celebrated **Olmstead** dissents. Mr. Justice Holmes put it this way:

> ". . . Government ought not to use evidence obtained and only obtainable by a criminal act. . . . I think it a less evil that some criminals should escape than that the Government should play an ignoble part." **Olmstead v. United States**, 1928, 277 U. S. 438, 469, 470.

This concern with the integrity of the judicial process must be most serious when the evidence has been obtained by a violation of the Constitution itself. The effectiveness of courts must always depend in large measure upon the respect which their processes command by reason of the integrity they reveal. From that point of view the courts of the United States, the ultimate guardians of the Constitution, cannot afford to play the "ignoble part" by themselves permitting the use of unconstitutionally obtained evidence, solacing and absolving themselves by deploring the unconstitutional seizure and pointing out that in some other proceeding sanctions can or should be

imposed against the violation of our fundamental law. This very point was made in the **Weeks** case with reference to evidence which federal officers had obtained by unreasonable search:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 232 U. S. at 392.

But the **Wolf** case has made this reasoning equally applicable to the now equally unconstitutional seizures by state officers.

Beyond the issue of judicial integrity, we should not assume that the refusal of the federal courts to permit the use of improperly obtained evidence will have no effect in persuading state as well as federal officers to follow constitutional methods and procedures in obtaining evidence. In the **Weeks** case the Supreme Court went so far as to say that if articles can be seized illegally by federal officers "and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." It cannot rationally be argued that the constitutional protection is so gravely impaired by using such evidence in federal courts when a federal officer has violated the Fourth Amendment, but that there is no significant impairment when it is a state officer who has been guilty of an equivalent violation of the Fourteenth Amendment. Perhaps the sanction of excluding such evidence

from federal trials has a greater deterrent effect upon federal officers than upon state officers. But there is no calculus to measure such a difference, nor is it the kind of difference which warrants opposite conclusions as to the admissibility of the evidence.

The money in controversy should not have been admitted in evidence against appellant. He is entitled to a new trial at which this evidence shall be suppressed.

Reversed and remanded for proceedings consistent with this opinion.

Nos.
221
224

LIBRARY
SUPREME COURT, U. S.

MOTION FILED MAY 1 1959

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

Nos. 221 and 224.

JOSEPH COSTELLO,
Petitioner,
v.
UNITED STATES OF AMERICA.

JOSEPH JOHN CANNELLA,
Petitioner,
v.
UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE AND SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1958.

Nos. 221 and 224.

JOSEPH COSTELLO,
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v.

UNITED STATES OF AMERICA.

JOSEPH JOHN CANNELLA,
Petitioner,

v.

UNITED STATES OF AMERICA.

(a) MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING.

Petitioners respectfully move for leave to file the annexed second petition for rehearing of the orders of this Court denying petitions for writ of certiorari in these cases, entered on October 13, 1958. Rehearing is sought at this time because this Court, on April 20, 1959, granted

certiorari in **Rios v. United States**, No. 40 Misc., October Term, 1958, which case, as is pointed out more fully in the annexed petition, contains a similar question to the second question and fourth question presented respectively in the Costello and Cannella petitions. The **Rios** case involves questions as to whether evidence obtained by state officers and used against a defendant in a federal prosecution may violate his rights under the United States Constitution, and if the evidence was unlawfully obtained, whether it is admissible in a federal prosecution when obtained by state officers without federal participation. The questions presented in the instant petitions for writ of certiorari include the issue whether evidence obtained by state officers is admissible in federal court despite the Fourth Amendment and the standards for the enforcement of Federal Criminal Statutes in federal courts.

Although this second petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time; and the court clearly has power, in its discretion, to entertain the petition. **Zap v. United States**, 330 U. S. 800; **Stone v. White**, 300 U. S. 643.

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(b) SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that this Court grant a rehearing of its orders of October 13, 1958, denying the petitions for writ of certiorari, and that a writ of certiorari issue to review the judgments of the Court of Appeals for the Eighth Circuit in the above-entitled cases as prayed for in the petitions filed July 25, 1958, and July 26, 1958.

Reasons for Granting the Rehearing and Issuing the Writ.

At the time of this Court's orders of October 13, 1958, this Court had not granted certiorari in **Rios v. United States**, No. 49 Misc., October Term, 1958, which presents the questions: "1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States," and "2. If the evidence was unlawfully obtained; was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?" The similar question presented by these petitioners in their petitions for a writ of certiorari is as follows:

> "Whether evidence obtained by state officers in a search and seizure found to be illegal in a proceeding in a state court of a state which follows the rule of exclusion is admissible in federal court, despite the Fourth Amendment and the proper standards for the enforcement of federal criminal statutes in federal courts."

Thus, the instant cases, as does **Rios**, involve the question of whether evidence obtained by state officers may violate

an individual's rights under the Constitution of the United States and whether such evidence, if unlawfully obtained, is admissible in a federal prosecution solely because it was obtained by state officers without federal participation.

In the four-count indictment in the instant case, count 1 charged petitioners Costello and Cannella with illegally transporting a revolver in interstate commerce in violation of 15 U. S. C 902 (e), Costello having previously been convicted of burglary. Count 3 charged the illegal receipt of this revolver by Costello in violation of 15 U. S. C. 902 (f). Count 2 was identical with count 1, except that it involved a different revolver. Count 4 was a conspiracy charge in which the overt act alleged was Cannella's obtaining these two revolvers. The facts on the issue here involved were summarized by the Eighth Circuit as follows (Costello Pet. App. 24):

> "Costello was arrested by St. Louis police officers and taken to the city jail where he was searched and questioned and discharged. The Cadillac car which he was driving when arrested was also searched. He denied having a key to the glove compartment of the car, but the police officers found one of the keys taken from him fitted the glove compartment lock. The officers opened the compartment with the key and took possession of a revolver contained in it, which was shown to be the revolver described in the indictment as having been received by him. The arrest, search and seizure were found to have been illegal under Missouri law in a proceeding in the Missouri State Court **and it is not contended for the government that they were legal under the federal law. But it was not shown that any federal officer took part in the search** and the court's refusal to suppress the gun and receiving it in evidence was sanctioned by the decision

of this Court in Jones v. United States, 8 Cir., 217 F. 2d 381, 382-383. Cf. United States v. Benanti, 2nd Cir., 244 F. 2d 389, 392. The Court's refusal to suppress the guns was without error." (Emphasis ours.)

The earlier decision in **Jones v. United States**, supra, was that evidence seized by state officers was admissible no matter how obtained when federal officers did not participate in the search.

The government's argument opposing certiorari recognized that both courts below based their affirmance on the ground that no federal officer participated in the search. It said however that this issue was not necessary for disposition of the case because the gun involved in Count 2 was not seized at the time of the arrest and "was not the subject of a motion to suppress" and that the other gun "was not the major part of the evidence of the crimes charged." But the position of the Government ignores the fact that the Eighth Circuit would have reversed this case on all counts because of its rule that where illegally obtained evidence is involved that court will not weigh its capacity to influence the jury. Thus in **Honig v. United States**, 8 Cir., 208 F. 2d 916, 921, the Court, in considering the admission into evidence of illegally seized blank stock certificates said:

> "Whether on the other hand the certificates might be contended to be of such slight relevance to a proving of the offense charged, in relation to appellant's intent, as not to be likely to have caused their admission to constitute a factor in the convicting of appellant we shall not consider. **An appellate court will not presume to evaluate the degree of prejudice in probativeness from relevant evidence obtained by illegal search and seizure whether the relevance of**

such evidence be immediate or remote. And no more will it undertake to appraise the effect of any irrelevant evidence so obtained and used where such evidence, though not relevant to the offense charged, is nevertheless not utterly innocuous but can debatably be said to be possessed of some capacity to influence the jury.

"A condoning of the use of any such evidence would of itself, against timely and proper protest made, amount to a deprivation of the immunity from unreasonable searches and seizures guaranteed by the Fourth Amendment. Cf. Weeks v. United States, 232 U. S. 383, 398, 34 S. Ct. 341, 58 L. Ed. 652. Constitutional guarantees of fundamental individual rights are entitled to whole-hearted judicial vindication, except where they have, by lack of timely and proper assertion or otherwise, been waived.

See also **United States v. Pugliese**, 2 Cir., 153 F. 2d 497, 499, where the Court said: "Only in case the prosecution which itself controls the seizing officials, knows that it cannot profit by the wrong, will that wrong be repressed."

It should be noted that counsel for the Government admitted that the entire indictment in this case was the result of the arrest of Costello (R. 32). And petitioners in their motion to suppress sought to suppress all of the evidence seized from Costello's automobile on February 27, 1956, the date of his arrest, and "any evidence gained directly or indirectly as a result of such search and seizure" (R. 29).

The government further argued in opposing certiorari (Brief for the United States in Opposition, pp. 10-11):

"If, however, the Court should deem the issue appropriate for resolution, we submit that the ruling of

the court below is correct. Evidence obtained by state officers without federal participation has been recognized as admissible in federal prosecutions ever since the federal rule of exclusion was first formulated . . . The facts that here the state has a rule of exclusion and that the evidence was actually excluded by a state court, do not change this principle. As the Ninth Circuit ruled with respect to a similar contention in **Rios v. United States**, decided May 26, 1958, petition for certiorari pending, No. 40 Misc., this Term, there is 'no reason why the same rule should not be applied where the determination that the evidence was illegally seized by state or local authorities is made by a state trial court. The "silver platter" doctrine operates on the assumption that the illegality of the state seizure has been established. How it has been established is immaterial.'

"Federal courts are not and should not be concerned with disciplining state officers. So long as federal officers are not involved, the federal courts may properly receive evidence which proves the violation of federal law. It is not a part of the federal court's jurisdiction or province to correct state officers."

The issues here involved are the same as in Rios. Certiorari should be granted and the instant cases should be set for oral argument with the **Rios** case. At the very least, in the event that the **Rios** case is decided in favor of petitioner, this Court's concern with the uniform administration of criminal justice will warrant a remand of the instant cases to the Eighth Circuit for re-examination in light of that case.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing a writ of certiorari issued to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel.

We hereby certify that the foregoing Second Petition for Rehearing is presented in good faith and not for delay

and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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